Wong Ho Enterprise Sdn Bhd & Ors v Tiong Hoo Teck

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO S-02–164 OF 2006

JAMES FOONG, RAUS SHARIF AND ABDULL HAMID EMBONG JJCA

27 FEBRUARY 2008

Civil Procedure — Injunction — Mareva injunction — Dissipation of assets, risk of — Final payment certificate for works done by subcontractor not finalised — Whether claim premature

This was an application to set aside the High Court order dated 25 January 2006 where a Mareva injunction was granted against the defendants/appellants from disposing of the first defendant's assets or monies until the trial of this action. The plaintiff, a sole proprietor subcontractor filed a claim against the first defendant company, a subcontractor who had been given a Ministry of Education ('MOE') contract to build teachers quarters and its two directors ie the second and third defendants for a sum of RM357,894.10 for works done under a subcontract. It was not in dispute that the plaintiff had completed the works. The first defendant had paid the plaintiff all contract sums due except for the final payment on the grounds that the final account and final payment certificate for the works had not been accepted by MOE and that the management consultant for the project was still in the process of compiling and calculating the final account sum for the approval of MOE. As such, any claim by the plaintiff was premature. Disputing the amount claimed by the plaintiff, the defendants alleged that, of the total contract sum for works done valued at RM2,338,374.85, only a balance of RM229,556 was due and payable to the plaintiff. The learned High Court judge had found that the conditions laid down in the agreement entitling the plaintiff to immediate payment of the balance sum had been satisfied and that it did not matter that the account had not been finalised by MOE.

Held, allowing the appeal with costs here and below:

(1) The learned judge was wrong in not considering the payment certificate had not been approved by the MOE. Pending the final account being finalised and approved by MOE, the plaintiff's claim was premature

and had caused uncertainty to the very cause of action mounted by the plaintiff. The learned judge was therefore wrong in granting the injunction (see paras 10–11).

(2) Further, there was no evidence in the affidavit to support any allegation that by delaying payment, the second and third defendants could siphon off the assets of the first defendant. The learned judge had also fallen into error in lifting the corporate veil of the first defendant in making his finding that the second and third defendants had schemed to delay the payment. Therefore there was no evidence pointing to a real risk of dissipation by the first defendant of its assets (see paras 15–16).

[Bahasa Malaysia summary

Ini adalah satu permohonan untuk mengenepikan perintah Mahkamah Tinggi bertarikh 25 Januari 2006 di mana satu injunksi Mareva diberikan terhadap defendan-defendan/perayu-perayu daripada melupuskan aset defendan pertama atau wang sehingga perbicaraan tindakan ini. Plaintif, subkontraktor tuanpunya tunggal memfailkan tuntutan terhadap syarikat defendan pertama, subkontraktor yang telah diberikan kontrak oleh Kementerian Pendidikan ('MP') untuk membina rumah guru-guru, dan dua orang pengarah-pengarahnya, iaitu defendan kedua dan ketiga untuk jumlah sebanyak RM357,894.10 untuk kerja-kerja yang telah dilakukan di bawah subkontrak tersebut. Ia tidak dipertikaikan bahawa plaintif telah menyelesaikan kerja-kerjanya. Defendan pertama telah membayar plaintif kesemua jumlah kontrak yang dihutang kecuali bayaran terakhir atas alasan bahawa akaun terakhir dan sijil bayaran akhir untuk kerja-kerja belum diterima oleh MP dan perunding pengurus projek tersebut masih dalam proses menyediakan dan mengira jumlah akaun terakhir untuk kebenaran MP. Oleh itu sebarang tuntutan oleh plaintif adalah pramasa. Mempertikaikan jumlah yang dituntut oleh plaintif, defendan-defendan mengakui bahawa dari jumlah keseluruhan kontrak untuk kerja-kerja yang telah dilakukan yang dianggarkan bernilai RM2,338,374.85, hanya baki sebanyak RM229,556 yang dihutang dan perlu dibayar kepada plaintif. Hakim Mahkamah Tinggi yang bijaksana mendapati syarat-syarat yang terdapat di dalam perjanjian yang memberi hak kepada plaintif untuk bayaran segera jumlah baki telah dipenuhi dan ia tidak menjadi hal walaupun akaun yang akhir masih belum dimuktamadkan oleh MP.

Diputuskan, membenarkan rayuan dengan kos di mahkamah ini dan Mahkamah Tinggi:

(1) Hakim Mahkamah Tinggi yang bijaksana tersilap dalam tidak mempertimbangkan bahawa sijil bayaran masih belum diluluskan oleh

MP. Sementara menunggu akaun yang terakhir diluluskan oleh MP, tuntutan plaintif adalah pramasa dan menyebabkan ketidakpastian kausa tindakan yang dimulakan oleh plaintif. Oleh yang demikian hakim yang bijaksana terkhilaf dalam memberikan injunksi tersebut (lihat perenggan 10–11).

(2) Selanjutnya tiada bukti dalam afidavit untuk menyokong sebarang dakwaan bahawa dengan melambatkan bayaran, defendan-defenden kedua dan ketiga akan menyalurkan keluar aset defendan pertama. Hakim yang bijaksana juga telah terkhilaf dalam mengangkat selubung perbadanan defendan pertama dalam membuat penemuan bahawa defendan-defendan kedua dan ketiga telah berpakat untuk melambatkan bayaran tersebut. Oleh itu tidak terdapat keterangan yang menunjukkan risiko sebenar pelupusan aset-aset oleh defendan pertama (lihat perenggan 15–16).]

Notes

For cases on Mareva injunction, see 2(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 3457–3534.

Cases referred to

Biasamas Sdn Bhd & Ors v Kan Yan Heng & Anor [1998] 4 MLJ 1 (refd)
Creative Furnishing Sdn Bhd v Wong Koi [1989] 2 MLJ 153 (refd)
S & F International Limited v Trans-Con Engineering Sdn Bhd [1985] 1 MLJ 62 (refd)

Appeal from: Suit No K22–02 of 2006 (High Court, Kota Kinabalu)

Ronny Cham (Ronny Cham & Co) for the appellant.
Ting Sing Chuan (Ting Anuar & Co) for the respondent.

Abdull Hamid Embong JCA (delivering judgment of the court):

[1] This was an application to set aside the High Court order dated 25 January 2006 where a Mareva injunction was granted against the defendants (appellants here) from disposing of the first defendant's assets or monies the particulars of which are as stated in the order (pp 219–221 of the appeal record) until the trial of this action.

[2] The plaintiff, a sole proprietor subcontractor filed a claim against the first defendant company and its two directors ie the second and third defendants for a sum of RM357,894.10 for works done under a subcontract.

[3] The first defendant, a subcontractor, had been given a Ministry of Education contract to build 14 units of teachers quarters in Tamparuli. The main contractor was one Sabatarget Sdn Bhd. A

[4] The plaintiff in undertaking the subcontract works had apparently accepted and acted on the second defendant's oral representation to pass over the subcontract works to the plaintiff. B

[5] It was not in dispute that the plaintiff had completed the works. The first defendant had paid the plaintiff all contract sums due except for this final payment, now the disputed subject of this suit. C

[6] The issue raised by the defendants was that the final account and final payment certificate for the works had not been accepted by the Ministry of Education ('MOE') and that the management consultant for the project are still in the process of compiling and calculating the final account sum for the approval of MOE. D

[7] The defendants had on numerous occasions informed the plaintiff that MOE had not finalised the final account. As such any claim by the plaintiff is premature. E

[8] Since the above assertions by the defendants were not challenged by the plaintiff they would be deemed accepted as undisputed facts. F

[9] The defendants admitted that of the total contract sum for work done valued at RM2,338,374.85 which is certified by the management consultant, only a balance of RM229,556 is due and payable to the plaintiff. The defendants disputed the sum now claimed by the plaintiff. G

[10] The learned High Court judge had found that the conditions laid down in the agreement entitling the plaintiff to immediate payment of the balance sum had been satisfied and that it did not matter that the account had not been finalised by MOE. We feel that the learned judge is wrong in not considering the payment certificate had not been approved by MOE. H

[11] We are of the view that pending the final account being finalised and approved by MOE, the plaintiff's claim is premature and this caused uncertainty to the very cause of action mounted by the plaintiff. On this ground alone we are of the view that the learned judge is wrong in granting the injunction. I

[12] The Supreme Court in *Creative Furnishing Sdn Bhd v Wong Koi* [1989] 2 MLJ 153 had held that one of the requirements to be satisfied before a Mareva injunction is granted is that the plaintiff must show that it has a good arguable case. This we feel is lacking in the plaintiff's case for the reason stated above ie that the final sum to be paid by the first defendant has not been determined.

[13] The next requirement is for the plaintiff to show that there was a real risk of the dissipation of assets before judgment by the defendants. It was held by this court in *Biasamas Sdn Bhd & Ors v Kan Yan Heng & Anor* [1998] 4 MLJ 1, there must be 'solid evidence to establish the risk', in order to meet this requirement.

[14] On this issue of dissipation, the learned judge said:

> As for the risk of dissipation, the very manner in which the plaintiff had disbursed its fund through a partnership with the second and third defendants as partners and who disbursed the funds through the partnership account are indicative of the machination employed by the defendants to leave the first defendant as a shell company.

[15] The defendants submitted that the learned judge was wrong in seemingly making a finding based on fraud when this was not pleaded by the plaintiff. The plaintiff had merely complained of the delay in paying up the final payment. However there was no evidence in the affidavit to support any allegation that by delaying payment, the second and third defendants could siphon off the assets of the first defendant. We therefore agree with the defendants' stand. We would also hold that the learned judge had fallen into error in lifting the corporate veil of the first defendant in making his finding that the second and third defendants had schemed to delay the payment.

[16] We could not from the facts find any evidence pointing to a real risk of dissipation by the first defendant of its assets. In fact the reverse is true in that the first defendant had all along fulfilled its obligations to make payments on the contract sum which were due and payable to the plaintiff.

[17] In our judgment, the defendants have a good defence: that payment could not be due when the approved final sum has yet to be determined by MOE. The defendants should not at this juncture be so harshly treated with a Mareva injunction slapped on them.

[18] In allowing this appeal, we are wary of the principle that an appellate court should 'defer to the judge's exercise of discretion and not interfere merely upon the ground that the members of the appellate court would have

exercised that discretion differently' (see *S & F International Limited v Trans-Con Engineering Sdn Bhd* [1985] 1 MLJ 62 (FC)).

[19] However in the exercise of his discretionary power, we feel that the learned judge had arrived at his conclusion based on the wrong assumptions and inferences.

[20] We are of the view that the plaintiff had not satisfied the two requirements as mentioned above to succeed in obtaining a Mareva injunction. For these reasons, this appeal was allowed with costs here and below.

Appeal allowed with costs here and below.

Reported by Sally Kee